

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2020-125-E

IN RE: Application of Dominion Energy South)
Carolina, Incorporated for Adjustment of)
Rates and Charges)
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**Motion for Reconsideration
of Order No. 2020-780**

Dominion Energy South Carolina, Inc. (“DESC” or the “Company”) respectfully requests the Commission reconsider Order No. 2020-780 issued in the above-referenced matter. In voting to issue a Request for Proposal for a consultant on the pending issue of rate of return, the Commission may have inadvertently run afoul of other statutes applicable to this issue. The order is unnecessary in light of the fact that the Company, parties, and intervenors have provided ample expert testimony on that issue, which remains pending before the Commission. The Company requests that the Commission reconsider the order, deny the motion, and confine its analysis to the expert testimony in the record.

In the order, the Commission voted to issue a Request for Proposal for a “consultant to provide technical assistance to the Commission related to the issues of the Rate of Return.” See Order No. 2020-780 issued November 18, 2020. The Commission relied upon Section 58-3-60(A) of the South Carolina Code as authority to hire this consultant. Id. That section is titled “Employment of clerk, attorneys, and other staff . . .” and provides the Commission:

[I]s authorized and empowered to **employ**: a chief clerk and deputy clerk; a commission attorney and assistant commission attorneys; hearing officers; and such other professional, administrative, technical, and clerical **personnel** as the commission determines to be necessary in the proper discharge of the commission’s duties and responsibilities as provided by law.

S.C. Code Ann. § 58-3-60(A) (emphasis added). As is evident from the emphasized language, that statute authorizes the Commission to employ the necessary permanent personnel to allow the Commission to operate on a day-to-day basis. The General Assembly did not intend for that section to be used to authorize the Commission to hire a consultant or expert on a case-specific basis.¹

Nor could Section 58-3-60(A) provide such authorization. A full review of the Code establishes that the General Assembly recognized the Commission cannot engage an expert for a specific pending matter and authorized the Office of Regulatory Staff to hire any expert, if necessary, for the pending action.

The General Assembly removed the Commission's investigative and fact-finding obligations that existed prior to the 2004 revision of the Commission role. For instance, subsequent language in Section 58-3-60 confirms that the Commission "shall not inspect, audit, or examine public utilities. The inspection, auditing, and examination of public utilities is solely the responsibility of the Office of Regulatory Staff." S.C. Code Ann. § 58-3-60(D). Section 58-3-200 further precluded the Commission from inspecting, auditing, or examining the public utility and moved those responsibilities to ORS. After the revision, ORS now "must employ the resources of the regulatory staff to furnish to the commission, or its members, such information and reports or conduct such investigations and provide other assistance as may reasonably be required in order to supervise and control the public utilities of the State and to carry out the laws providing for their regulation." Hiring a Commission expert to examine the Company's rate of return request conflicts with the removal of the Commission's investigative and fact-finding role.

¹ The Commission promulgated a regulation that confirms this section addresses hiring of permanent Commission staff. See S.C. Code Ann. Reg. 103-813 (addressing staff hires).

Moreover, a third-party consultant or expert hired by the Commission does not qualify as a “commission employee.” As such, the hiring of a Commission expert would implicate and violate the ex parte communication rules established by the General Assembly. Those rules prohibit “a commissioner, hearing officer, or commission employee” from “communicat[ing], directly or indirectly, regarding any issue that is an issue in any proceeding or can reasonably be expected to become an issue in any proceeding with any person **without notice and opportunity for all parties to participate in the communication.**” S.C. Code Ann. § 58-3-260(B) (emphasis added).

That section makes clear that should the Commission utilize Section 58-3-60 to hire a consultant to provide guidance on the rate of return issues, then any and all communications must be done in the presence of the Company, ORS, and all other intervening parties.² The Commission cannot hire a substantive expert not subject to cross examination by the Company and have that expert provide advice not contained in the record without violating the ex parte prohibitions.

The hiring of the consultant does not fall within any exception to the ex parte prohibitions. In fact, the General Assembly confirmed the ex parte prohibitions for such one-time consultant in drafting the exceptions. Commissioners are not allowed to have ex parte communications “between and among commissioners” or “receive aid from commission employees” during a pending matter except in very limited circumstance. Those limited circumstances are not present in this matter. Pertinent here, the rules prohibit ex parte communications with commission employees if the communications “**furnish, augment, diminish, or modify the evidence in the record.**” S.C. Code Ann. § 58-3-260

² Also, any such communications, even if proper, would be subject to disclosure under our Freedom of Information Act. S.C. Code Ann. § 58-3-260(C)(8).

(C)(8)(b). Receiving advice from employees on rate of return that differs from the testimony entered into the record by the parties would violate this prohibition because the Commission would consider or rely upon evidence not in the record.

For these same reasons, the Commission cannot avoid these prohibitions by hiring a staff person able to render the similar advice to the Commission as the proposed expert or consultant would. That is because the rate of return issue “is an issue in [this] proceeding or can reasonably be expected to become an issue in any proceeding” as contemplated Section 58-3-260(B). The advice rendered by staff would also “furnish” the Commission with evidence or information not in the record and certainly would “augment, diminish, or modify” the rate of return testimony filed by the Company in violation of Section 58-3-260 (C)(8)(b). Thus, the ex parte rules would still require all parties to participate in the communications between the Commission and the staff member. S.C. Code Ann. § 58-3-260(B).

Finally, the General Assembly knew how to authorize the Commission to hire a consultant or expert. The General Assembly used express direction in such instances and did so only in two instances. The Commission can hire “an expert or third-party consultant to conduct an independent study” (1) in evaluating integration of emerging energy technologies and (2) in avoided cost proceedings. See S.C. Code Ann. § 58-37-60(C); S.C. Code Ann. § 58-41-20(I) (allowing experts but making them subject to the ex parte prohibitions in Chapter 3, Title 58). The General Assembly did not expressly authorize the Commission to hire an expert or consultant in Section 58-3-60(A) or in any other regulatory matter.

This is consistent with the directive from the General Assembly that the Commission’s regulatory authority shall be conducted through written, pre-filed testimony of the parties, ORS, and intervenors. See S.C. Code Ann. § 58-3-140. The Commission also must conduct a hearing

where “[o]ppportunity must be afforded all parties to respond and present evidence and argument on all issues involved.” S.C. Code Ann. § 1-23-320. The code makes no mention of testimony by a Commission witness that would be exempt from these requirements. Ex parte advice from a consultant or staff member to the Commission would violate these explicit written testimony and examination requirements.

Therefore, a full review of the code establishes that the Commission cannot engage an expert for a specific pending matter. The General Assembly limited the Commission to render its decision on the evidence presented by the parties and examination of the witnesses by the parties to the rate proceeding. Hiring an expert or consultant for this matter would violate the intent of the General Assembly and create an appellate issue that is completely unnecessary and easily avoidable.

The Company believes the cleanest solution would be for the Commission to reconsider the order, deny the motion, and confine its analysis to the expert testimony in the record. The Company thereby respectfully moves for this relief and asks for an Order granting this request.

Respectfully submitted,

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November 25, 2020

Columbia, South Carolina

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2020-125-E

IN RE: Application of Dominion Energy South Carolina, Incorporated for Adjustment of Rates and Charges))))))	CERTIFICATE OF SERVICE
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This is to certify that I, Michael J. Anzelmo, have served this date one (1) copy of DESC's **Motion for Reconsideration** in the above-referenced matter to the person(s) named below by causing said copy to be electronically mailed, addressed as shown below:

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November 25, 2020

Columbia, South Carolina